No. 86-1383 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEW YORK LAND COMPANY, JOSEPH BERNSTEIN, RALPH BERNSTEIN, CANADIAN LAND COMPANY OF AMERICA, N.V., HERALD CENTER LTD., and NYLAND (CF8) LTD.,

Petitioners,

v.

THE REPUBLIC OF THE PHILIPPINES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OF THE REPUBLIC OF THE PHILIPPINES IN OPPOSITION

Counsel for Respondent,
The Republic of the Philippines

SEVERINA RIVERA
Presidential Commission on Good Government
Republic of the Philippines
1617 Massachusetts Avenue, N.W.
Washington, D.C. 20036

MORTON STAVIS*
MAHLON F. PERKINS, JR.
PETER WEISS
Center for Constitutional Rights
666 Broadway
New York, New York 10012
(212) 614-6425

CLIVE S. CUMMIS
JEFFREY J. GREENBAUM
PHILIP R. SELLINGER
Sills, Beck, Cummis, Zuckerman, Radin, Tischman & Epstein, P.A.
450 Park Avenue
New York, New York 10022

* *Counsel of Record*

Of Counsel on the Brief:

ABRAM CHAYES
Harvard Law School
Cambridge, Massachusetts 02138

KEITH HIGHET
Curtis, Mallet-Prevost Colt & Mosle
101 Park Avenue
New York, New York 10078

RONALD L. OLSON
RICHARD B. KENDALL
Munger, Tolles & Olson
355 South Grand Avenue
Los Angeles, California 90071

Adams Press Corp., 1188 Raymond Boulevard, Newark, New Jersey 07102—(201) 623-8611

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MEMORANDUM OF THE REPUBLIC OF THE PHILIPPINES IN OPPOSITION

Statement of the Case

Petitioners herein seek review of an order granting a preliminary injunction issued by the District Court for the

Southern District of New York and unanimously affirmed by the Court of Appeals.[1]

The Republic of the Philippines, respondent herein, brought the action below against Ferdinand Marcos, the deposed dictator of the Philippines, his wife Imelda, and a group of individuals and corporations associated with them. The thrust of the action was to seek injunctive relief based on an underlying claim for constructive trust in favor of plaintiff with respect to four valuable pieces of commercial property in New York City and an estate in Long Island.[2]

The specific relief prayed for in the Complaint was a preliminary and a final injunction preventing the transfer or encumbrance of the properties pending the determination of their true ownership. Petitioners seek review only of the issuance of a preliminary injunction by the District Court.

Plaintiff claims that the five properties were purchased and maintained as a private investment for Mr. and Mrs. Marcos with monies belonging to the Philippine Govern-

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[1] The Opinion and Order of the District Court granting a preliminary injunction is reprinted in Appendix B to the Petition for Certiorari. The opinion of the Court of Appeals is reprinted in Appendix A. Related opinions of the District Court appear in Appendices C and D. References to these opinions are cited as "Pet.App. ."

[2] This property, known as the Lindenmere estate, was originally the subject of Petition No. 86-1377, filed by defendant Ancor Holdings. Ancor subsequently moved to withdraw its petition pursuant to a settlement between plaintiff and defendant Antonio Floirendo, the principal of Ancor, providing, among other things, for the return of the property to plaintiff. The motion to withdraw was granted on March 30, 1987.

ment and illegally acquired by the Marcoses. Evidence presented by the plaintiff showed that the basic plan of Marcos as applied to his New York real estate investments was to spirit such monies out of the Philippines to purchase the properties and place title thereof in offshore corporations organized in the British Virgin Islands and the Netherlands Antilles. The stock of these corporations was held by various Panamanian corporations that, in turn, issued bearer shares. Petitioners Joseph and Ralph Bernstein were instrumental in devising the plan and in acquiring as least three of the properties for the Marcoses (40 Wall Street, the Crown Building and Herald Center), referred to by the Court of Appeals as the "Bernstein properties." Pet.App. 5a. They also arranged the corporate structures described above. For some time prior to mid-1985, they were the managing directors of the offshore corporations, handling their corporate affairs. Subject to a recent order of the District Court (*infra*, p. 9), they also managed the properties for Marcos on a day-to-day basis through their corporation, the New York Land Company. Title to a fourth commercial building, 200 Madison Avenue, was placed in Glockhurst Corporation, also a Netherland Antilles corporation, whose stock is held by three of the Panamanian corporations. A real estate management firm other than that of the Bernsteins manages 200 Madison Avenue.

Besides the Marcoses, who have defaulted (after acknowledging service through their counsel), the Bernsteins and New York Land Company are named as defendants and co-conspirators in the action, as are a number of other associates of the Marcoses who implemented the Marcos foreign investment program in New York (Gliceria Tantoco, Vilma Bautista and Antonio Floirendo, none of whom

appeared below). Also named as defendants are the five separate offshore corporations doing business in New York in which title to the five pieces of property was placed—Canadian Land Company, Herald Center Ltd., Glockhurst Corporation, NYLand (CF8) Ltd., and Ancor Holdings, N.V.[3] None of the corporations has any busines other than the ownership of one of the properties.[4]

On the filing of the Complaint the state court issued an order to show cause and a temporary restraining order. Defendants removed the proceeding to the United States District Court for the Southern District of New York before the hearing on the preliminary injunction. Judge Leval extended the temporary restraining order from time to time with the consent of defendants to permit discovery to go forward on the issues presented by the request for the preliminary injunction.

Prior to the removal, President Corazon Aquino of the Philippines set in motion the new government's efforts to recover property that, as alleged by the plaintiff, had been plundered by Marcos, his wife and close associates during the period of his rule. Unlike other countries in similar situations, however, the Aquino government did not seek to confiscate these properties or transfer ownership directly to the Philippines. Instead, it sought only to prevent their dissipation or concealment beyond the reach

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[3] As stated in n.2, *supra*, Ancor Holdings is no longer a petitioner. A number of other defendants were named who are irrelevant to this Petition.

[4] The opinion of the Court of Appeals identifies the particular property placed in each of the offshore corporations and describes their ownership by various Panamanian corporations. Pet.App. 4a-5a.

of Philippine authorities pending a judicial determination of rightful ownership.

Executive Order No. 1 establishes the Presidential Commission on Good Government (PCGG), with the status of a cabinet ministry, and charges it with the task of recovering the ill-gotten wealth converted from the government and people of the Philippines by the former dictator. Pet.App. 6a n.2. Executive Order No. 2 freezes all assets and properties inside the Philippines as to which there is evidence showing that they were illegally acquired. As to properties located outside the Philippines, it "authorize[s] the Commission on Good Government to appeal to foreign countries to freeze the assets of the Marcoses and their associates." Pet.App. 6a. In both cases, the Order makes clear that any freeze is merely pending the outcome of appropriate proceedings in the Philippines to determine whether the properties were unlawfully acquired.[5]

On April 21, 1987, defendants below refused to participate further in the discovery process and withdrew their consent to further extension of the temporary restraining order. Pet.App. 18b-19b.[6] On May 2, 1986, after hearing,

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[5] Pursuant to this provision, Executive Order No. 14, dated May 7, 1986, directed that all proceedings under Executive Order No. 2 would be tried before a judicial tribunal that had in fact been established during the Marcos regime to hear cases of official graft and corruption. Appeal lies from that court to the Supreme Court of the Philippines. The Philippine legal and judicial system closely parallels that of this country.

[6] Judge Leval regarded this refusal to proceed with discovery as improper, even though consent to the temporary restraining order had been withdrawn, invoked Fed.R.Civ.P.37 in assessing the facts before him.

Judge Leval issued the preliminary injunction that is the subject of this petition for certiorari. Although the order prohibited defendants from transferring or encumbering the properties without leave of court, it was carefully drawn to permit effective day-to-day management.

Defendants appealed, and the Court of Appeals for the Second Circuit unanimously affirmed the issuance of the order in an opinion by Judge Oakes, carefully reviewing the uncontested evidence.[7] The court rejected a number of affirmative defenses—unenforceability of foreign confiscatory decrees, sovereign immunity, and *forum non conveniens*—on the ground that defendants had not made a sufficient factual showing of the applicability of these defenses and that the mere possibility of such defenses eventually prevailing should not bar provisional relief. Pet.App. 34a-38a.

Defendants now seek a writ of certiorari to review that decision.[8]

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[7] As of the date of the Court of Appeals decision, none of the defendants had filed an answer or affidavit disputing the truth of the facts on which the District Court acted and that were considered, as thereafter supplemented, by the Court of Appeals.

[8] The Petition lists eight "Questions Presented." The brief of defendant Glockhurst Corporation in support of the Petition addresses only the applicability of the Act of State doctrine and the justiciability of the action. This Memorandum in Opposition answers the arguments in both documents.

Facts That Have Emerged since the Closing of the Record Before the Court of Appeals and That Should Be Called to the Attention of This Court

An unusual array of new facts, all reflected in pleadings and other papers filed in the District Court after submission of the case to the Court of Appeals, raises serious questions as to whether petitioners are the proper parties in interest before this Court and whether the issues decided by the Court of Appeals and upon which review is sought are currently the issues in controversy between the parties. We respectfully suggest that this Court consider these facts, summarized below, in evaluating the request that it exercise its discretion to grant certiorari at this phase of the case.[9]

1) On September 29, 1986, a New York City law firm, Shereff Friedman Hoffman & Goodman, filed a motion in the District Court to substitute itself for Bernstein Carter & Deyo (Joseph Bernstein's law firm) as counsel for three of the offshore title-holding corporations, and to disqualify the Bernstein firm from proceeding further in the action. The Shereff firm claimed to be acting on behalf of one Karl Petersen as agent for the three corporations and Glockhurst. Lodged Doc. 1. Bernstein Carter & Deyo are vigorously resisting this application, which as of this date has not been decided.

2) On November 25, 1986, Shereff Friedman, again claming to act for the three corporations, filed a separate action seeking among other things an accounting by the Bernsteins, damages, and rescission of the Bernsteins' management contract. *Canadian Land Co. of America,*

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[9] The documents referred to in the summary have been lodged with the Clerk of this Court and will be cited as "Lodged Doc. ."

v. *Joseph Bernstein,* S.D.N.Y. 86 Civ. 9087, Lodged Doc. 93. Upon the filing of the Complaint, the court issued an order to show cause and a temporary restraining order restricting the expenditure of funds by the corporations. Lodged Doc. 122. On April 7, 1987, Shereff Friedman moved to hold Bernstein and his firm in contempt of the restraint, as extended, for withdrawing more than $550,000 from the accounts of the corporations to pay themselves legal and management fees. Lodged Doc. 127. The withdrawals allegedly took place on January 12 and again on January 13, 1987, the day Judge Leval ruled that a receiver should be appointed for the properties and prohibited payments of any kind "without court approval pending the receiver's assumption of control." Lodged Doc. 217-231. The motion for contempt as well as a request for an order directing return of the funds is pending as of the date of this submission.

3) On deposition, Karl Petersen testified that he was in fact representing Adnan Khashoggi of Saudi Arabia and that in 1985 Mr. Khashoggi had obtained ownership of the corporations. This was the first time that Mr. Khashoggi's claim of ownership surfaced in the litigation. As applied to two of the properties, the claim was purportedly based on certain documents (Lodged Doc. 209-212) emanating from the non-appearing defendant Gliceria Tantoco, who now resides in Rome and had been the intermediary acting between the Marcoses and the Bernsteins in the acquisition of the New York properties.[10]

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[10] No affidavit of Mr. Khashoggi or Mrs. Tantoco has been filed in this matter, nor has either yet appeared for depositions, although efforts to obtain their testimony are under way. No documents have to date been presented that purport to substantiate Mr. Khashoggi's claim of ownership of the other two properties.

4) On December 19, 1986, the Bernstein interests filed a "RICO" complaint against Mr. Marcos, Mr. Khashoggi, Mrs. Tantoco, Shereff Friedman and others, charging them with a conspiracy to violate the contractual rights of the Bernsteins. *Manhattan Land Co.* v. *Marcos,* S.D.N.Y. 86 Civ. 9729, Lodged Doc. 142. The complaint included a claim that in July of 1985 Marcos, as the beneficial owner of the Panamanian corporations, sold the capital stock of the offshore corporations other than Glockhurst to the Bernsteins. In this document, and in an answer and counterclaim filed in the Philippine action 3 days earlier, the Bernsteins for the first time asserted by formal submission that they have an enforceable agreement to acquire the stock of the corporations. Joseph Bernstein has since filed an affidavit purporting to amplify the factual basis for this claim and asserting that the documents presented by Mr. Petersen to establish Mr. Khashoggi's alleged ownership of the properties are fraudulent. Lodged Doc. 163-205.

5) On January 13, 1987, the District Court on application of the Philippine Government ruled that a receiver should be appointed with respect to the three Bernstein properties and the Glockhurst property.[11] The court found that "the Bernsteins' role in the management of the properties is fraught with conflicts of interest." Lodged Doc. 221.

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[11] The Court of Appeals erroneously stated that the District Court had earlier appointed a receiver. Pet.App. 9a. In fact, Judge Leval did not actually make the ruling referred to in the text until January 13, 1987. Thereafter, for fear that the appointment of a receiver would trigger a default under ground leases and mortgages, he decided to appoint instead a special property advisor with tight controls over expenditure of funds. Lodged Doc. 232-239.

Reasons for Denying the Petition

The Petition should be denied. The case is not ripe for review. The decisions below applied familiar principles of law in a straightforward fashion to reach the proper results. The case presents no legal questions of general importance requiring review by this Court. The notoriety of the events from which it arose affords no basis for review.

POINT I

The Interlocutory Order does not threaten any public interest and does not finally decide issues tendered by the petition; moreover, the supervening facts raise questions whether the proper parties in interest and the actual issues in controversy are before the court.

While this Court undoubtedly has jurisdiction to review interlocutory orders, it does so only in "extraordinary cases." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). This is hardly an extraordinary case requiring intervention before the full record is made. No public interest is threatened by the preliminary injunction. Indeed, as the Court of Appeals noted, the Department of State indicated that it did not believe defendants had shown the applicability of the Act of State or sovereign immunity defenses. Pet.App. 27a-28a. The court continued, "By implication this position carries with it the proposition that the United States does not consider this suit to be an improper intrusion on its management of foreign affairs." *Id.* The footnote to this passage cites a declaration of the Undersecretary of State for Political Affairs

which indeed suggests that the interest of the United States would be served by honoring the request of the Philippine Government for the relief here granted. *Id.*, n.3.

As pointed out above, the courts below have not actually decided the sovereign immunity, Act of State, and related issues raised in the Petition.

This is also a case in which the relevant facts are undergoing continuous change and development. The attention of this Court ought not to be engaged before all the facts have been established and the legal issues clearly defined and acted upon by the lower courts.

The facts summarized above, pp. 7 to 9, raise the most serious questions as to whether the proper parties in interest are before this Court on the Petition. In the proceedings below, the Bernsteins did nothing to disabuse the District Court and the Court of Appeals of their view that Marcos was the beneficial owner of the properties and that the offshore corporations represented by Bernstein Carter & Deyo were effectively appearing for the Marcos interests. Pet.App. 6b-14b, 13a-14a. It now appears that the Bernsteins are suing the Marcoses for allegedly refusing to give effect to an agreement to sell them the buildings. Item 4, *supra,* p. 9. If, as it seems to be doing, this case ultimately develops into a tri- or quadri-partite litigation involving the Philippine Government, the Marcoses, the Bernsteins, and Khashoggi, the issues in controversy undoubtedly would differ considerably from those upon which the Court of Appeals acted.

Should the District Court, after hearing testimony, decide that the alleged agreement between Marcos and the

Bernsteins never existed or is unenforceable,[12] the Bernsteins would have no standing as individuals to argue the alleged defenses presented in the Petition. They would be interlopers before this Court on those issues. Moreover, should the District Court decide that neither the Bernsteins nor Khashoggi owns the corporations,[13] ownership would remain with Marcos, who has defaulted. In that event, a decision of this Court on the issues presented in the Petition would be irrelevant to any actual controversy.

In the view of the Philippine Government, the Bernsteins' tale of having bought the properties in July 1985 and the Khashoggi story of having acquired the properties through Mrs. Tantoco in August 1985 are both inventions designed to show a transfer from Marcos before the re-

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[12] The Bernsteins have no signed agreement but rely on a telephone conversation with one Roland Gapud, which they claim was unrecorded. In other conversations, of which they produced recordings, Gapud clearly said there was no agreement. The Bernsteins have some obvious statute of fraud problems. Moreover, it is undisputed that long after the alleged telephonic agreement was made, the parties were exchanging drafts of proposed agreements, some with significant modifications from earlier drafts. Lodged Doc. 191. None of the drafts was ever signed. The Bernsteins are hard pressed to show that they have a binding agreement. *See Winston* v. *Mediafair Entertainment Corp.*, 777 F.2d 78 (2d Cir. 1985); *Reprosystem B.V., et al.* v. *SCM Corp.*, 727 F.2d 257 (2d Cir. 1984).

[13] The Khashoggi claim first emerged months after this case was submitted to the Court of Appeals and is based on documents of highly questionable authenticity. Joseph Bernstein has submitted an affidavit swearing that Petersen proposed to him a plan whereby they should contrive to make it appear that Marcos had passed the properties to Khashoggi. Lodge Doc. 167. His affidavit also includes documented indications that a paper claimed to have been executed in August 1985 was predated and was in fact drafted in May 1986. Lodged Doc. 214-216.

straining order of March 2, 1986. Whether these parties are genuinely in conflict or whether even the conflict itself is a machination of Marcos is at this time not clear.

As demonstrated below, the Petition presents no serious legal issues. In any event, given the current state of the litigation it seems inappropriate for this Court to act until the smoke has cleared and it can be ascertained who if anyone has a cognizable interest in making claims before it and which if any issues are ripe for decision.

POINT II

The preliminary injunction was properly issued by the District Court.

A. A preliminary injunction prohibiting the transfer of properties within the jurisdiction of the court and issued in accordance with the applicable federal standard is not a deprivation of property without due process of law.

Petitioners claim and respondent agrees that a temporary deprivation of property by order of a court must meet the requirements of due process. In cases like this one, due process is satisfied if the applicable criteria for the issuance of a preliminary injunction are met.

The test applied by the courts below is that enunciated by the Second Circuit in *Jackson Dairy* v. *Hood,* 596 F.2d 70, 72 (1979). Under it a preliminary injunction will issue on a showing of "(a) irreparable harm, and (b) . . . sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of

hardships tipping decidedly toward the party requesting the preliminary relief."

It is universally recognized that on a request for a preliminary injunction, the greater the balance of hardships in plaintiff's favor, the smaller the likelihood of prevailing on the merits that must be shown. *See* Mansfield, J., concurring, in *Jackson Dairy,* 596 F.2d at 74. The canonical statement of this relationship is in Judge Frank's opinion in *Hamilton Watch Co.* v. *Benrus Watch Co.,* 206 F.2d 738, 740 (2d Cir. 1953):

> [If] the balance of hardships tips decidedly toward plaintiff, it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation . . . .

The *Jackson Dairy* test is but a refined formulation of *Benrus.* This approach has been uniformly adopted, *e.g., Johnson* v. *Bergland,* 586 F.2d 993, 995 (4th Cir. 1978); *Productos Carnic* v. *Central American Beef & Seafood Trading Co.,* 621 F.2d 683 (5th Cir. 1980); *In re DeLorean Motor Co.,* 755 F.2d 1223, 1228-30 (6th Cir. 1985); *General Leaseways* v. *National Truck Leasing Association,* 744 F.2d 588 (7th Cir. 1984); *Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.,* 526 F.2d 86, 88 (9th Cir. 1975) (reversing denial of preliminary injunction where denial was based on plaintiff's failure to establish probability of prevailing on the merits); *Anthony* v. *Texaco, Inc.,* 803 F.2d 593, 599 (10th Cir. 1986); *cf. Avramadis* v. *Arco Petroleum Products Co.,* 798 F.2d 12 (1st Cir. 1986) (statutory adoption of *Benrus* test); *see also* Note, *Probability of Ultimate Success Held Unnecessary for Grant of Interlocutory Injunction,* 71 Colum. L.Rev. 165 (1971).

If the *Jackson Dairy* test is met, a preliminary injunction is available to restrain the transfer of assets to prevent their dissipation so as to render the judgment unenforceable. *See, e.g., International Controls* v. *Vesco,* 490 F.2d 1334, 1347 (2d Cir. 1974); *In re Feit & Drexler, Inc.,* 760 F.2d 406, 416 (2d Cir. 1985); *Rockwell International Systems, Inc.* v. *Citibank, N.A.,* 719 F.2d 583, 586-88 (2d Cir. 1983); *Productos Carnic, supra,* 621 F.2d at 687. In none of these cases was it ever suggested that a preliminary injunction prohibiting transfer or encumbrance of assets raises any question under the due process clause.

Petitioners' reliance on the statutory provisions governing attachment proceedings misconceives the nature of the action below. The Complaint does not state a claim for money damages, does not allege the existence of an unpaid debt, does not seek to sequester the assets to satisfy an eventual money judgment. Therefore, Fed.R. Civ.P. 64, which deals only with "remedies for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action," is inapplicable, and § 6201 of the New York Civil Practice Law is irrelevant. Statutory remedies governing attachments in actions at law do not purport to limit the historic power of equity courts to maintain the status quo and protect their jurisdiction by interlocutory restraints on transfers of assets. *See* Note, *supra,* 71 Colum. L.Rev. at 166-67.

Petitioners' reliance on *De Beers Consolidated Mines, Ltd* v. *United States,* 325 U.S. 212 (1945), is equally unavailing. In that case, brought under the Sherman Act,

the plaintiff sought what was in effect an attachment of defendants' assets to satisfy a possible fine for contempt of a requested injunction against conduct in restraint of trade, which was the only final relief available under the Act. The case thus stands only for the proposition that preliminary injunctive relief may not be granted where the final judgment could not grant the relief being sought preliminarily. *See USACO Coal Co.* v. *Carbomin Energy, Inc.*, 689 F.2d 94, 97 (6th Cir. 1982) (distinguishing *De Beers* in the same way). In fact, *De Beers* supports plaintiff's position in this case. See *infra*, p. 19.

Petitioners cite *Fuentes* v. *Shevin*, 407 U.S. 67, 97 (1972), for the proposition that due process is satisfied only if plaintiff can show "the validity or at least the probable validity of the underlying claim." Pet. at 9. Again, petitioners have confused a preliminary injunction with an attachment order. But even in the context of pre-judgment attachment, the teaching of *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975), decided after *Fuentes*, is that the order is constitutional if issued by a judicial officer upon non-conclusory allegations "clearly setting out the facts" that entitle the creditor to the order and provision is made for an early post-attachment hearing "at which the creditor is required to demonstrate at least probable cause for *the garnishment*." 419 U.S. 601, 607 (emphasis added). The formula amounts to little more than a specialized version of the requirements for a preliminary injunction. Ordinarily it is sufficient that plaintiff at such a hearing establish a *prima facie* case on the merits and show a substantial possibility that, in the absence of the protection afforded by the order, the garnished assets would be dissipated

before judgment. The *Di-Chem* test is fully satisfied on the record below.[14]

B. In conformity with the two-court rule, this Court will not review the determination by both courts below that the criteria for issuance of a preliminary injunction were met on the record of this case.

Both the District Court and the Court of Appeals found on the facts that the *Jackson Dairy* test for a preliminary injunction was amply met. In a careful review of the record developed in a discovery truncated by the resistance of the defendants, Judge Leval canvassed behavior of the defendants, testimony, and documentary evidence (including partially burned records found in the Malacanang Palace after the hasty departure of Marcos and his wife) tending to prove that the Marcoses owned the properties,[15] that they "misappropriated funds of the Republic, and that they have used such misappropriated funds in connection with the New York properties." Pet.App. 14b. The allegations asserting the underlying claim for constructive trust were thus "sufficiently substantiated to

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[14] The Complaint in the New York state court, on which the temporary restraining order was issued, contained nonconclusory allegations clearly setting out the facts that entitled plaintiff to the order. The hearing on the preliminary injunction was held on April 28, only a week after defendants' consent to the temporary restraining order was withdrawn. There plaintiff assumed and carried the burden of establishing probable cause that it was entitled to the continuation of the restraints on alienation or encumbrance of the properties.

[15] Although Judge Leval noted that the evidence with respect to ownership of Lidenmere was "less compelling," Pet.App. 13b, that property is no longer being contested in this case.

make . . . provisional relief fair and equitable." Pet.App. 12c. Judge Leval concluded that although the evidence "certainly falls short of conclusively demonstrating Marcos' ownership of the Properties, it is more than sufficient to raise fair questions for litigation . . . ." *Id.* at 6b-7b.

As to the other elements of the test, Judge Leval found:

> Plaintiff has made a strong showing of irreparable harm. If the restraints are dissolved, the Properties could pass quickly out of the plaintiff's reach through transactions involving the various tiers of offshore holding companies, which are shrouded in secrecy.

Id. at 20b. On the balance of hardship, "the harm risked by the plaintiff is enormous." *Id.* By contrast, "the defendants have shown no significant harm if [the preliminary relief] is granted." *Id.* Judge Leval stressed that "the restraints have been and will continue to be carefully tailored to permit the defendants the maximum benefit of profitable operation while maintaining the status quo." *Id.* at 20b-21b.

The Court of Appeals also reviewed the record and pronounced that "[o]verall, the evidence of ownership of the Bernstein properties is strong, if not overwhelming . . . ." *Id.* at 13a. Although the opinion acknowledges that Glockhurst "is on a slightly different footing," it demonstrates that the situation is essentially similar to that of the other properties. *Id.* at 14a. It found "sufficient evidence . . . to support the district court's . . . finding[] of irreparable harm." *Id.* at 16a.

The case is thus one in which both courts below have extensively reviewed the record and concurred in findings of fact. Under the two-court rule, this Court will not disturb such findings. *Graver Tank Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U.S. 3 (1936). The rule should be especially potent in light of this Court's insistence that preliminary injunctions are to be reviewed only for abuse of discretion by the district court. *Brown* v. *Chote*, 411 U.S. 452, 456-57 (1973).

C. The preliminary injunction is ancillary to the final relief on the causes of action asserted in the District Court.

It is hornbook law that the function of a preliminary injunction is to preserve the status quo so that the court will be able to give meaningful final relief. Wright & Miller, *Federal Practice and Procedure*, § 2947; 7 Moore, *Federal Practice* § 65.04 [1]. "[T]he most compelling reason in favor of issuing a Rule 65(a) order is to prevent the judicial process from being rendered futile by defendant's action or refusal to act." Wright & Miller at § 2947, p. 424. The power to issue such orders is inherent in the district courts as courts of equity and is to be exercised in accordance with historic equity practice.

This Court has held that "[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally." *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, 220 (1945); *see Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 290 (1940) (also cited for this proposition in *DeBeers*). Preliminary relief to maintain the status

quo is especially appropriate where fraud, concealment or breach of fiduciary duty are involved. The likelihood of dissipation of the assets in these cases necessitates injunctive restraints to enable the court to give meaningful final relief, *e.g. International Controls Corp.* v. *Vesco,* 490 F.2d 1334, 1347 (2d Cir. 1974); *SEC* v. *Manor Nursing Centers Inc.,* 458 F.2d 1082, 1105-06 (2d Cir. 1972); *USACO Coal Co.* v. *Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982); *cf. IIT* v. *VENCAP, Ltd.,* 519 F.2d 1001, 1019 (2d Cir. 1975) (even though subject matter jurisdiction and litigable issues on the merits were not established on record below, Court of Appeals retained jurisdiction, thus keeping preliminary injunction in place to prevent dissipation of assets).

The restraint on defendants' assets in this case is directly related to the final relief sought. The preliminary injunction is consistent with the ultimate imposition of a constructive trust on the New York properties in favor of the plaintiff. Further, an action for constructive trust is precisely the type of case in which evidence of fraud and breach of fiduciary duty supports an interim order designed to avoid the dissipation of assets.

In addition, the complaint asserts a cause of action for final relief in the form of an injunction extending the interlocutory order. This claim conforms to the request of the Philippine Government in Executive Order No. 2. The District Court was empowered to grant such relief under the federal common-law rule governing the enforcement of foreign decrees purporting to affect property located in this country. This rule, as stated by Judge Friendly in *Republic of Iraq* v. *First National City Bank,* is that "extraterritorial enforcement of [such decrees] turns on whether the

decree is consistent with the policy and law of the United States." 353 F.2d 47, 51 (2d Cir. 1965).*See also Allied Bank International* v. *Banco Credito Agricola de Cartago,* 757 F.2d 516 (2d Cir. 1985) (rule applied to Costa Rican exchange control order).

As the courts below noted, in this case, unlike *Republic of Iraq,* no act of confiscation has occurred. Pet.App. 35a, 10c. Executive Order No. 2 seeks only to prevent alienation or encumbrance of the properties pending proceedings to establish the underlying rights and obligations of the parties. No final transfer of the properties is contemplated except pursuant to a judicial determination.

It follows that, contrary to petitioners' contention (Pet. 10-12), the holdings on the merits in *Republic of Iraq* and *Bandes* v. *Harlow & Jones Inc.,* 570 F.Supp. 955 (S.D. N.Y. 1983), are inapplicable. The foreign decrees in those cases directly confiscated defendants' properties and purported of their own force to transfer ownership to the government.[16] Thus enforcement was inconsistent with the law

[16] The *Bandes* decision turned on the interpretation of five interrelated Nicaraguan decrees, of which petitioners refer only to one. Pet. at 11. Although that decree seemed to provide for an adjudication of plaintiff's rights in the contested property, the court noted that "the Nicaraguan authorities appear to be proceeding on the premise that Bandes's ownership had already passed to them by forfeiture under earlier decree No. 282." 570 F.Supp. at 959. The court found that the "net effect" of all five decrees was a "taking without compensation" inconsistent with the law and policy of the United States. *Id.* at 963. *F. Palicio* v. *Compania, S.A.* v. *Brush,* 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd* 375 F.2d 1011 (2d Cir. 1967) and *Zwack* v. *Kraus Bros. & Co.,* 237 F.2d 255 (2d. Cir. 1956), also cited by petitioners (Pet. at 12), are similarly distinguishable. Both involve claims related to an outright confiscation of property by a foreign government.

and policy of the United States. In this case, however, the District Court's response to the Philippine appeal to prevent the alienation or encumbrance of the Marcos assets was consistent with the law and policy of the United States because the preliminary injunction was issued in accordance with applicable federal standards.

POINT III

Petitioners' affirmative defenses are equally without merit.

A. The District Court has personal jurisdiction over petitioners.

Petitioners' challenge to personal jurisdiction is specious. Ralph and Joseph Bernstein are present within the forum state. New York Land Company, Canadian Land Company, Herald Center Ltd., and NYLand Ltd. are all corporations established for the purpose of owning, controlling or managing properties within New York and have been authorized to do business in the state.

Shaffer v. *Heitner,* 433 U.S. 186 (1977), is beside the point. That case deals with an effort to establish personal jurisdiction solely on the basis of ownership of property. Here jurisdiction over the petitioners is based on personal service on the parties in the forum state, plus, in the case of the individual defendants, their residence, and, in the case of the corporate defendants, their engaging in, and their authority to do, business, in that state.

B. Petitioners have not shown that the Act of State doctrine is applicable in this case.

Petitioners have failed to show that the actions plaintiff challenges are based on acts of state.[17] It is a well-established and incontrovertible proposition that the defense bars review only of acts of a foreign sovereign that can properly be characterized as "public" and "governmental." *See Alfred Dunhill of London, Inc.* v. *Republic of Cuba,* 425 U.S. 682, 694 and n. 10 (1976); *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 401 (1964); *Filartiga* v. *Pena-Irala,* 630 F.2d 876, 889 (2d Cir. 1980); *Hunt* v. *Mobil Oil Corp.,* 550 F.2d 68, 73 (2d Cir. 1977); *Restatement of Foreign Relations Law* (Revised) § 469 (Tent. Draft No. 7, 1986).[18] These acts include:

> constitutional amendments, statutes, decrees and proclamations, and in certain circumstances . . . physical acts such as occupation of an estate by the state's armed forces in application of state policy.

Id., comment i at 58-59 (form and proof of Act of State).[19]

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[17] As the courts below recognized, the burden of proof is on the party invoking the Act of State defense (Pet.App. 32a-33a, 21b); *see also Restatement of Foreign Relations Law* (Revised) § 469, comment i at 59 (Tent. Draft No. 7, 1986).

[18] For a detailed review of these and other supporting cases, see Judge Oakes's opinion, Pet.App. 30a-32a.

[19] What distinguishes acts of state from private acts is not whether a "private citizen could have performed any of the wrongful acts with which Marcos is charged" (Glockhurst Brief at 9), but whether their performance by Marcos involved an exercise

(Footnote continued on following page)

Defendants have neither asserted nor presented any evidence demonstrating that the acts by which the Marcoses acquired the properties are acts of this character.

Judge Leval properly recognized that Act of State might become relevant if he were asked to consider the basic liability issues or in some other context. But he concluded:

> On the incomplete record before the court at this stage, and bearing in mind the great hardship to the plaintiff of any dissolution of the restraints, the mere possibility that the doctrine may later prove to be a viable defense is not sufficient grounds to block the issuance of an otherwise appropriate preliminary injunction.

Pet.App. 22b. The inadequacy of the record is accentuated by the supervening facts discussed at pp. 7 to 9, *supra*.

Even if defendants had properly made the defense and the issues were actually before the District Court, appli-

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(Footnote continued from preceding page)

of his official responsibilities under Philippine law. In any event, the argument in the Glockhurst brief (p. 11) that there is no private act exception to the Act of State doctrine and that in giving effect thereto the Court of Appeals for the Second Circuit is in conflict with two decisions of the Ninth Circuit evaporates on a reading of the opinions.

In *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 712 F.2d 404, 406 (9th Cir., 1983), the court specifically stated that "without sovereign activity effectuating public rather than private interests, the act of state doctrine does not apply." *See also Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F.Supp. 92 (C.D. Cal. 1971), *aff'd.* 461 F.2d 1261 (9th Cir. 1972) (Act of State doctrine applicable based on clear indication in complaint "that the ruler of Sharjah acted at all times in his official capacity and on behalf of his State").

cation of the Act of State doctrine to this case would stand policy on its head. The ultimate objectives of the doctrine are the avoidance of offense to foreign states and the maintenance of the primacy of the Executive in foreign affairs. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 427-433 (1964). To apply it here would be a direct affront to the Philippine Government and would interfere with the foreign policy objectives of the United States in relation to the Republic of the Philippines.

C. There is no serious issue as to sovereign immunity or *forum non conveniens.*

The defense of sovereign immunity is now governed by the Foreign Sovereign Immunities Act, which extends limited immunity only to a "foreign state" and a "political subdivision . . . or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603. Defendants below are neither and thus cannot raise the defense. If petitioners are seeking to assert head of state immunity, they are neither present nor former heads of state, and Marcos has defaulted.

As to *forum non conveniens,* it is sufficient to quote the Court of Appeals. Judge Oakes observed:

> The assets in dispute are pieces of real property, fixed and immovable. It thus seems difficult to deem the Southern District of New York an inconvenient forum. Nor is there any showing that an alternative forum is available and adequate to provide appropriate remedies in respect to this property, ultimate ownership of which rests with the holders of bearer shares of offshore corporations.

Pet.App. 37a-38a.

Petitioners' attempt to assert this defense reduces to a very simple ploy. The case cannot be tried in New York, it is argued, because the facts are in the Philippines; the property is in New York so the Philippine court has no power to protect it. As the courts below have held, this stratagem should not be permitted to shelter schemes for multi-national swindling from judicial review.

D. The issues presented are justiciable by a U.S. Court.

Glockhurst argues that the absence of judicially manageable standards to determine the legality of a foreign sovereign's acts under foreign law raises an important issue of justiciability. Glockhurst Brief at 14-15. As the courts below thoroughly understood, this case, at its present stage, does not tender issues as to the legality of defendant Marcos acts under Philippine law. In any case, ultimate liability is predicated on alleged fraud, corruption, and malfeasance in office. It is a little late in the day for the assertion that courts are incompetent to adjudicate such charges.

The issues presented in this case are not only justiciable, but the adjudication already rendered is unexceptionable and does not merit review. The applicable standard is that governing the grant of preliminary relief by U.S. district courts. The standard is well understood, frequently applied, and eminently manageable. Both courts below concluded that its requirements for a preliminary injunction were amply met. Petitioners have adduced no basis for disturbing that conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Counsel for Respondent,
The Republic of the Philippines

SEVERINA RIVERA
Presidential Commission on Good Government
Republic of the Philippines
1617 Massachusetts Avenue, N.W.
Washington, D.C. 20036

MORTON STAVIS*
MAHLON F. PERKINS, JR.
PETER WEISS
Center for Constitutional Rights
666 Broadway
New York, New York 10012
(212) 614-6425

CLIVE S. CUMMIS
JEFFREY J. GREENBAUM
PHILIP R. SELLINGER
Sills, Beck, Cummis, Zuckerman, Radin, Tischman & Epstein, P.A.
450 Park Avenue
New York, New York 10022

* *Counsel of Record*

Of Counsel on the Brief:

ABRAM CHAYES
Harvard Law School
Cambridge, Massachusetts 02138

KEITH HIGHET
Curtis, Mallet-Prevost Colt & Mosle
101 Park Avenue
New York, New York 10078

RONALD L. OLSON
RICHARD B. KENDALL
Munger, Tolles & Olson
355 South Grand Avenue
Los Angeles, California 90071

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